**W. J. Lewis Corp.—W. Lewis—J. Lewis, a Partnership *and* Marvin R. Brinker.** Case 18-CA-6586

August 3, 1981

## DECISION AND ORDER

On December 17, 1980, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, W. J. Lewis Corp.—W. Lewis—J. Lewis, a Partnership, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In the section of his Decision entitled "The Remedy," the Administrative Law Judge found that the backpay due the discriminatees is to be calculated at the wage rates set forth in Respondent's collective-bargaining agreement with the Union. Respondent excepts on the ground that the record evidence is insufficient to determine whether the work being done by the discriminatees at the time of their discharge was within the scope of the contract. We find the record inadequate to determine whether the discriminatees' work fell within the scope of the contract. Accordingly, we leave to the compliance stage of this proceeding the question whether backpay is to be calculated at the wage rates set forth in the contract.

Member Jenkins would award interest on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

## DECISION

### STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: The complaint in this case against W. J. Lewis Corp.—W. Lewis—J. Lewis, a Partnership,[1] was heard by me in Minneapolis, Minnesota on September 17, 1980.[2] The charge was filed on February 28 by Marvin R. Brinker, an individual. The complaint, which issued on April 16 and was amended at the hearing, alleges that W. J. Lewis Corp.—W. Lewis—J. Lewis, a Partnership (herein called Respondent or the Company), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The gravamen of the complaint, as amended, is that on or about February 26 the Company allegedly discharged Marvin R. Brinker, Timothy Block, and a third welder employee whose name is presently unknown to the General Counsel, because of their union and concerted activities and to discourage employees from engaging in such activity. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. Only the General Counsel filed a brief.

Upon the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the arguments of the parties and the brief submitted by the General Counsel, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

The Company, a partnership owned and operated by W. J. Lewis Corp., a corporation, and two individuals, William Lewis and Jack Lewis, maintains its principal office and place of business in Orange, California. The Company is engaged in business as a contractor in the construction industry. In the operation of its business, the Company annually performs services valued in excess of $50,000 in States other than California. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local Union No. 49, AFL-CIO (herein called the Union), is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

S. J. Groves & Sons Company (herein called Groves), a contractor in the construction industry, is and was at all times material the general contractor, pursuant to a contract let by the Minnesota Department of Transportation (herein called MDOT), for the construction in Minneapolis, Minnesota, of a tunnel project for the purpose of draining storm water off Interstate Highway 94. The project is located within the Union's geographic jurisdiction. Since early 1979, Groves has been a signatory and has agreed to be bound by the terms of a collective-bargaining contract between the Union and Associated General Contractors of Minnesota, Highway, Railroad and Heavy Construction (herein called AGC), a multiemployer bargaining association, which contract is effective by its terms from May 1, 1978, through April 30, 1981. The contract provides, *inter alia*, for hiring of employees in the operating engineers' craft exclusively through the Union's referral system. The contract further provides wage scales in various job classifications. Insofar as pertinent to this case, the contract provides for a wage of $11.43 per hour, plus fringe benefits, for employees in

[1] The formal papers were amended at the hearing to reflect the correct name of Respondent.

[2] All dates herein refer to the period from October 1, 1979, through September 30, 1980, unless otherwise indicated.

the categories of mechanic or welder, working in the Minneapolis metropolitan area during the period of May 1, 1979, to May 1, 1980.

Groves subcontracted a portion of the project work, consisting of certain soft ground excavation and the installation of a support tunnel, to the Company. The Company commenced work near the end of October and completed its operations in or about May. About the time it commenced work, the Company, by its Secretary-Treasurer Jack Lewis, and at the Union's request, became a signatory to and agreed to abide by the terms of the contract between the Union and AGC. The present record does not indicate what, if any other, bargaining relationships the Company had with respect to this job. Thereafter, and continuing into April, the Company obtained employees through the Union's referral system. The Union's dispatch records indicate that the Company obtained some 25 employees in this manner, including many in the categories of mechanic and welder. These employees were paid at the contract rate. However, there was considerable employee turnover. In February, the Company, bypassing and without giving any notice to the Union, advertised in the newspapers for welders, and informed applicants and prospective applicants that the starting pay was $8 per hour. Marvin Brinker, Timothy Block, and a third welder, unidentified by name, were hired in this manner and paid at the rate of $8 per hour. They were assigned to weld rings for the support tunnel. Each worked on a different shift. In the meantime, welders who were referred by the Union, including those who performed the same type of work, were paid at the contract rate.

Brinker began working for the Company on February 13. Brinker, the only employee witness in this proceeding, testified that shortly after reporting to work he spoke to two company employees named John and Clarence, who identified themselves as union members and, respectively, as machine operator and maintenance welder.[3] They compared their wage rates, and the union members suggested that Brinker contact the hall and try to join the Union. A few days later, Brinker telephoned the union hall and spoke to Darrell Neilsen, the Union's area business agent. Brinker told Neilsen about the circumstances of his employment, and asked about joining the Union. Neilsen, who had already been alerted to the fact that the Company was advertising for welders and offering $8 per hour, told Brinker that he would check into the matter and stop by the job. The next day Neilsen saw Secretary-Treasurer Jack Lewis. Neilsen testified that he complained to Lewis that the Company was not using the union hall, whereupon Lewis answered that he could hire welders anywhere he wanted. According to Neilsen, Lewis asserted that he farmed out the welding work to another firm. Lewis initially refused to identify the firm, but then claimed that it was "Acme Construction." Neilsen asked if it was one of Lewis' companies, and Lewis answered: "What if it is one of my companies?" Neilsen testified that he stated that one of the employees wanted to join the Union, whereupon Lewis replied: "Well, I'm not going to have any union problems around here. Tell me who he is and I will get rid of him." Neilsen initially refused to identify the employee, but he argued that Lewis was obligated to pay the "prevailing wages," which were also set forth in the contract. Neilsen then identified Marvin Brinker as the employee in question, and asserted that he would "sign him up." Neilsen and Lewis argued about the applicability of the Davis-Bacon Act and its Minnesota counterpart to the welders' wage rate. Neilsen suggested that they meet with Groves, the general contractor, to resolve the problem, but Lewis objected to the proposal. Instead, on Tuesday of the following week (February 26) Brinker was summoned to Lewis. Brinker testified that Lewis handed him two paychecks, saying: "There was a complaint through the union hall that I wasn't paying you enough wages, that eight dollars wasn't good enough so, furthermore, I have to let you go." The Company stipulated at the hearing that the other two nonreferred welders were terminated at the same time as Brinker and that all three were terminated for the same reason. It is undisputed that the Union never requested that the three employees be terminated or replaced by employees referred through the Union. Rather, the Union's only demand was that the welders be paid at the contract rate, which the Union contended was also the applicable prevailing wage rate under Federal and state law.

Secretary-Treasurer Lewis, the Company's only witness, denied telling Brinker that he was letting him go because of complaints that Brinker was talking to the Union. Lewis testified that he terminated the three welders because MDOT was taking the position that their work was subject to the Davis-Bacon Act. (In correspondence in May, MDOT took the position that Brinker and Block, under the applicable prevailing wage formula, should have each been paid $10.43 per hour, plus $.85 in fringe benefits, for a total of $11.28.) During the Regional Office investigation of the present case, Lewis submitted a position letter in which he stated that a question was raised with respect to the applicability of the prevailing wage formula, and that he stopped the work until the question was resolved.[4] In fact (although Lewis testified that the question has not yet been resolved), Lewis admitted in his testimony that the Company replaced the alleged discriminatees with employees referred from the Union, who were paid the contract rate. Lewis testified that the welding work performed by the alleged discriminatees was completed about the end of March, but that the Company performed additional welding work until about the end of April. Lewis admitted that he was fighting "two distinct wars," one over the Davis-Bacon Act and the other with the Union, and that, while attempting to resolve the Davis-Bacon matter with the State, he was "content to wage the war with the union as to whether they had jurisdiction or not." Lewis assert-

[3] The Union's dispatch records indicate that John "Brad" Mills was referred in January. The records do not indicate any "Clarence." However, Lawrence Larson was also referred in January. Both were referred in the category of mechanic/welder.

[4] Lewis contends, in sum, that the welding work was offsite work, which was not covered by the prevailing wage formula. At the present hearing, Lewis also offered to prove that the $8 per hour which he paid the nonreferred welders, rather than the union contract rate, more nearly reflected the prevailing area standard.

ed that the Ironworkers Union had jurisdiction over the welding work. However, no evidence was presented that the Company had any contractual relationship with the Ironworkers Union, or sought one, or that the Ironworkers claimed jurisdiction over the welding work. Lewis admitted that he did not terminate the welders because of any jurisdictional claim. Rather, Lewis' own course of conduct evidenced a recognition that the Company was party to a collective-bargaining agreement with the Union which covered that work. Specifically, Lewis consistently obtained welders through the Union except when, in a clandestine manner, he sought to evade the contract by directly hiring welders to work at a rate which was substantially below the contract rate. In contrast to his strongly expressed opinions, Lewis was conspicuously vague when testifying about the conversations with Neilsen and Brinker. Lewis testified that he did not tell Neilsen that he was going to fire anyone, but that he may have implied that he would terminate the welders. Lewis also testified that he did not "recall" Brinker asking for a reason for his termination, and that "I think I mentioned to him that I was having difficulty with the state" over the applicability of the Davis-Bacon Act.

I credit the testimony of Neilsen and Brinker. I find that Lewis, in furtherance of his "war" with the Union, discharged Brinker, Block, and the third nonreferred welder in reprisal for Brinker's complaint that he was entitled to the benefits of the union contract and in further reprisal for the Union's action in pursuing that claim and asserting that all of the welders were entitled to the contract rate of pay. The Company thereby violated Section 8(a)(1) and (3) of the Act. By complaining to the Union concerning his job situation, Brinker engaged in union and concerted activity which is protected under the Act. Therefore, by discharging the three nonreferred welders in reprisal for such activity, the Company violated Section 8(a)(1) and (3). *Perrenoud, Inc.*, 236 NLRB 804 (1978). Moreover, Brinker did not act alone. Rather, he complained to the Union after consultation with and at the suggestion of two other employees. Although Brinker asked Neilsen about joining the Union, it is evident that Brinker did so because he was under the mistaken impression that he had to join in order to be entitled to the contract rate of pay. In essence, he was seeking the Union's assistance in obtaining that rate of pay. Neilsen's complaints to Lewis, which were not limited to Brinker, but applied to all of the nonreferred welders, plainly constituted lawful union activity. The three welders had at least an arguable right to be paid the contract rate of pay. Therefore, it is immaterial that Block and the third nonreferred welder did not personally complain about their situation prior to their discharge. It is also immaterial that they were not expressly named in the unfair labor practice charge filed by Brinker. In light of the Company's admission that all three welders were terminated for the same reason, the General Counsel was warranted in amending the complaint to allege that Block and the third welder were also unlawfully terminated. *N.L.R.B.* v. *Dinion Coil Company, Inc.*, 201 F.2d 484, 491 (2d Cir. 1952). As indicated, I have found that all three welders were terminated for the same reasons, but that the reasons were unlawful.

## CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discriminating in regard to the tenure of employment of Marvin R. Brinker, Timothy Block, and a third welder employee, thereby discouraging membership in the Union, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
4. By terminating said employees, and thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As the Company completed its operations in the Minneapolis area in or about May 1980, and the three discriminatees would have been laid off at or by that time, I shall not recommend a reinstatement remedy. However, I shall recommend that the Company be ordered to make the employees whole for any loss of earnings they may have suffered by reason of the discrimination against them. Identification of the third discriminatee shall be left to the compliance stage of this proceeding. As indicated with respect to the merits of this case, the three employees had at least an arguable right to the contract wage rate. I further find, upon consideration of the evidence, that the Company did in fact breach its collective-bargaining contract with the Union by paying the employees less than the contract rate. As the Company was contractually obligated to pay the higher rate, it is immaterial whether the Company was also failing to comply with the prevailing area standards for purposes of the Davis-Bacon Act and its Minnesota counterpart. Therefore, backpay should be computed upon the basis of the applicable contract rate, plus benefits. The employees are entitled to backpay for such period of time as welding or substantially equivalent work was available for them. The backpay for said employees shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[5] It will also be recommended that the

[5] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

Company be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay due. As the Company has completed its operations in the Minneapolis area, I shall recommend that, in addition to posting an appropriate notice at its present office and principal place of business, the Company be directed to mail copies of such notice to all current and former employees employed in the Minneapolis, Minnesota, area from February 25, 1980, until the Company ceased operations in that area in or about May 1980.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[6]

The Respondent, W. J. Lewis Corp.—W. Lewis—J. Lewis, a Partnership, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Union of Operating Engineers, Local Union No. 49, AFL-CIO, or any other labor organization, by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

(b) Discharging employees or in any other manner discriminating against them with regard to their hire or tenure of employment or any other term or condition of employment because they claim rights under a collective-bargaining contract or because they engage in any other union or concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Make whole Marvin R. Brinker, Timothy Block, and the third nonreferred welder employee who was terminated at or about the same time for any losses they suffered by reason of the discrimination again them, as set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Post at its office and principal place of business copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail copies of the aforesaid notice, postage prepaid, to each of its present and former employees who was employed in the Minneapolis, Minnesota, area during the period from February 25, 1980, until the Company ceased operations in that area.

(e) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in International Union of Operating Engineers, Local Union No. 49, AFL-CIO, or any other labor organization, by discriminatorily terminating our employees, or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT discharge our employees or in any other manner discriminate against them with regard to their tenure of employment or any term or condition of employment because they claim rights under a collective-bargaining contract or because they engage in any other union or concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole Marvin R. Brinker, Timothy Block, and the third nonreferred welder employee who was terminated at or about the same time for any losses they suffered by reason of the discrimination against them.

W. J. LEWIS CORP.—W. LEWIS—J. LEWIS, A PARTNERSHIP